

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM CAPRON and KIMBERLEE
JOHNSON,

UNPUBLISHED
June 30, 2009

Plaintiffs-Appellants,

v

J. RICHARD ROBINSON,

No. 286005
Ingham Circuit Court
LC No. 08-000079-CZ

Defendant-Appellee.

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiffs, acting *in propria persona*, appeal as of right the trial court’s order granting defendant’s motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs are the children of Dr. Willard Capron. Defendant was Dr. Capron’s attorney. At one time, plaintiffs were designated beneficiaries of Dr. Capron’s A.G. Edwards & Sons, Inc. retirement account: plaintiff William Capron was to get twenty percent, plaintiff Kimberlee Johnson was to get forty percent, and the remaining forty percent was designated to Dr. Capron’s wife, Marie, who was not the natural mother of plaintiffs. Dr. Capron was diagnosed with brain cancer in November 2001. Shortly after his diagnosis, on November 21, 2001, Dr. Capron changed the beneficiaries of his retirement account to make Marie the sole beneficiary. Shortly thereafter, Marie was given durable power of attorney. Dr. Capron died on December 19, 2001, while under hospice care.

Plaintiffs sued Marie, alleging that she breached her fiduciary duty and used undue influence, fraud, and coercion to get Dr. Capron to change his beneficiary designation for the retirement account. Ultimately, plaintiffs settled this action for approximately \$17,000, signing a settlement agreement releasing Marie “and her agents, successors, heirs, and personal representatives from any and all claims, actions, causes of action (whether in tort, contract or otherwise), demands, rights, damages, costs, attorney or other fees, expenses, and compensation whatsoever” Nevertheless, thereafter, William sued A.G. Edwards (the investment firm) for conflict of interest, breach of fiduciary duty, and fraud. William and Kimberlee also filed the instant suit against defendant.

The complaint in this case alleges that defendant, as Marie's attorney, engaged in attorney misconduct, evidence tampering, omission of material evidence, fraud or conspiracy to obtain by fraud, fraudulent concealment, undue influence, conflict of interest, and coercion. Plaintiffs sought an order compelling Ingham Regional Medical Center and Hospice of Lansing to produce Dr. Capron's medical records and any documents relating to his power of attorney designation, and they requested actual and punitive damages in the amount of \$400,000.¹

The trial judge originally assigned to the case signed subpoenas compelling the medical providers to produce the requested documents, and then moved to disqualify himself because defendant frequently practiced in his courtroom; a different judge was assigned to the case. Hospice of Lansing filed a "motion for direction regarding subpoena," arguing that it faced a dilemma between complying with the subpoena and complying with federal confidentiality requirements, particularly in light of the fact that Dr. Capron's informed consent expressly stated, "Do not share info with son-Bill Capron." At the hearing on the motion, the trial court stated that the first judge admitted he erred in signing the subpoenas because the informed consent specifically directed medical information not be released to William. The court ordered that the records need not be provided.

Defendant moved for summary disposition under MCR 2.116(C)(7) (claim barred by earlier release) and (C)(8) (failure to state a claim). He argued that the settlement agreement between plaintiffs and Marie expressly released him as "her agent" from further claims. He also argued that the "claims" asserted in the complaint were either barred by the expiration of the period of limitations, were not sufficiently alleged, or are not recognized causes of action in this state. Rather than responding to the motion, plaintiffs filed an amended complaint to add "obstruction" as a count and provide some factual allegations supporting it. Defendant moved to strike the amended complaint.

The trial court held a combined hearing on defendant's motions. William indicated that the heart of his suit was his theory that because defendant and Marie colluded to exclude plaintiffs from the money by tricking Dr. Capron into signing various documents, the settlement should be voided. The trial court indicated that such a claim must be made to the court that entered the settlement. The trial court explained that the release was valid on its face, and that without an order holding it otherwise, plaintiffs were bound by it. The trial court entered an order granting defendant's motion for summary disposition under MCR 2.116(C)(7), mooting defendant's motion to strike the amended complaint, and denying plaintiffs' motion to amend the complaint.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Grimes v Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006). When presented with a motion for summary disposition brought pursuant to MCR 2.116(C)(7), the court considers the pleadings, affidavits, and other documentary evidence submitted by the parties to determine whether the claim is barred by release. MCR 2.116(C)(7), (G)(2) and (G)(5).

¹ At the time of his death, Dr. Capron's retirement account had a total of just over \$125,000; plaintiffs originally were to receive sixty percent of this, or about \$75,000.

Reviewing the record presented on appeal, we find that the trial court properly granted defendant's motion. Plaintiffs have repeatedly ignored the release they voluntarily signed as part of the settlement of their action against Marie. That release was clear, broad, and unambiguous that plaintiffs could no longer sue Marie or her agents, including defendant, regarding the retirement account. Thus, the trial court did not err by finding that earlier release barred the instant claim under MCR 2.116(C)(7).

Further, fraud claims must be pleaded with "particularity." MCR 2.112(B). To establish a claim for fraud, plaintiffs must allege an intentional misrepresentation by defendant; for fraudulent concealment they must allege defendant breached a legal duty to disclose information to them. *M&D, Inc v WB McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998). For undue influence, plaintiffs must show that defendant overpowered Dr. Capron's own volition, causing him to act against his inclination and free will. *In re Estate of Peterson*, 193 Mich App 257, 259; 483 NW2d 624 (1991). The complaint in this case contains only vague and conclusory allegations that are insufficient to establish a claim for fraud. Finally, the trial court did not err in denying plaintiffs' *oral* motion to amend the complaint (no written motion was ever made) because plaintiffs only intended to amend in response to defendant's (C)(8) motion. The trial court granted summary disposition under (C)(7), and plaintiffs expressly state they "request no amendment based on MCR 2.116(C)(7)." Thus, amendment would have no effect on the court's order.

Moreover, plaintiffs do not come close to making "particularized" allegations that defendant tricked them into signing the release, even when the pleadings are read generously in their favor. Any allegations that defendant or Marie fraudulently caused Dr. Capron to change beneficiaries should and could have been raised in the original action against Marie. The only evidence discovered after that action was the check with which Marie paid defendant for his work on the power of attorney, which was discovered during the litigation with A.G. Edwards & Sons, Inc. Proof that Marie acquired power of attorney and paid defendant for it adds almost nothing to the sufficiency of the evidence. Even if it did, plaintiffs' remedy is to move for relief from judgment in the court that entered the settlement agreement, not to sue Marie's attorney.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio